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No. 91-740

IN THE

Supreme Court of the United States

October Term, 1991

WALTER L. NIXON, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

Petitioner was removed from office as a federal judge in 1989 following an impeachment hearing before a committee of twelve Senators.

1. Whether a committee hearing on perjury charges, in which eighty-eight members of the Senate are unable to evaluate witness credibility, satisfied the express constitutional command in Article I, section 3, clause 6 that the Senate "try all Impeachments."

2. Whether the courts' refusal to review a claim that the Senate committee hearing procedure is unconstitutional is contrary to the holding in *Powell v. McCormack*, 395 U.S. 486 (1969), disrupts the constitutional balance of powers, and threatens judicial independence.

LIST OF PARTIES TO THE PROCEEDING IN THE U.S. COURT OF APPEALS

WALTER L. NIXON, JR.
Appellant

UNITED STATES OF AMERICA,
JAMES A. BAKER, III,
U.S. Secretary of State,
and RALPH MECHAM,
Director of the Administrative Office
of the United States Courts,
Appellees

UNITED STATES SENATE
Amicus Curiae

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BRIEF OF PETITIONER

OPINIONS BELOW

The three opinions of the court of appeals are reported at 938 F.2d 239 (D.C. Cir. 1991) and are included as Appendix A to the Petition for Writ of Certiorari ("Pet. App. A"), at 1a-57a. The opinion of the court of appeals denying a petition for rehearing (Pet. App. F, at 84a-85a) is unreported. The district court decision (Pet. App. B, at 58a-69a) is reported at 744 F. Supp. 9 (D.D.C. 1990).

JURISDICTION

The decision of the court of appeals was issued on July 9, 1992. A petition for rehearing was denied on August 5, 1991 (Pet. App. E, at 83a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND SENATE RULE INVOLVED

The following provisions of the Constitution and Senate Rule are set out in Appendix A to this Brief ("Pet. Br. App. A"):

Article I, Section 3, Clauses 6 and 7

Article II, Section 2, Clause 1

Article II, Section 4

Article III, Section 2, Clause 3

Senate Impeachment Rule XI

STATEMENT OF THE CASE

The impeachment trial clause of the Constitution, Article I, section 3, clause 6, creates a uniquely American constitutional structure, designed principally to balance the powers of the branches of government. The Framers closely limited the impeachment power to provide a meaningful check on the executive and judiciary while protecting them from legislative domination. To strike that balance, impeachment was designed to be a deliberate trial proceeding before the Senate.

Through its first 150 years, the Senate discharged its duty to "try all Impeachments" by conducting ten impeachment proceedings on the Senate floor, before the entire body. That practice implemented both the constitutional text and the Framers' view that in order to preserve judicial and executive independence, impeachment cannot be streamlined, but must be a Senate trial of specific charges based on evidence.

When Senate Impeachment Rule XI was applied to petitioner in 1989, the evidence on perjury charges was presented to a committee of only twelve senators, less than one-eighth of the Senate. Eighty-eight senators heard no testimony, viewed no witnesses, and could not evaluate witness

credibility in a "trial" to determine who was lying and who was telling the truth. The trial under Rule XI was an expedited proceeding fundamentally different from that intended by the Framers.

1. The Constitutional Convention Shapes American Impeachment

The Framers devoted considerable energy to what became the impeachment trial clause, debating it repeatedly from their opening sessions until the end of the Constitutional Convention. Although the Framers embraced the idea of impeachment, they struggled for months over what entity should have such ultimate power and how to control its exercise. The Senate trial — an admittedly ungainly solution — emerged slowly, after the delegates carefully considered alternatives and rejected proposals designed to expedite the removal of executive or judicial officers.

a. First Proposals

On May 29, 1787, Edmund Randolph of Virginia opened the "main business" of the Convention with a proposed plan known as the "Virginia Resolutions." 1 *Records of the Federal Convention* 18, 20 (M. Farrand ed. 1966) [hereinafter "Farrand"]. On impeachment, Randolph followed the Virginia Constitution, proposing trial of impeachments of "National officers" in judicial courts. *Id.* at 22; *Federal and State Constitutions*, H.R. Doc. No. 357, 59th Cong., 2nd Sess. (1909), vol. VII at 3818 [hereinafter "*State Constitutions*"]. A competing plan, offered on the same day by Charles Pinckney of South Carolina, proposed that the "Senators and Judges of the foederal Court, be a Court for trying Impeachments." 1 Farrand 23 & n.14; 3 Farrand 608. This proposal closely followed the impeachment trial provision contained in the South Carolina Constitution of 1778. *See State Constitutions*, *supra*, vol. VI at 3253.[1]

[1] The delegates knew state impeachment practice well. At least eight delegates had helped draft five state constitutions with impeachment

Four days later, John Dickinson, representing Delaware, moved to increase Congress' power to remove executive officials. Dickinson proposed that "the Executive be made removable by the National Legislature on the request of the majority of the Legislatures of individual States." 1 Farrand 85. George Mason protested that Dickinson's proposal would reduce the Executive to "the mere creature of the Legislature," *id.* at 86, and it was overwhelmingly defeated. *Id.* at 87.

On the same day, the delegates approved the motion of Hugh Williamson of North Carolina to make the executive "removable on impeachment and conviction of mal-practice or neglect of duty." *Id.* at 88. That language followed the impeachment provision in the North Carolina Constitution of 1776. *State Constitutions*, *supra*, vol. V at 2789-90. The Virginia Resolutions also were amended on June 13 to confide impeachment trials to the federal courts. 1 Farrand 223-24.[2]

b. The Committee Of Detail

Impeachment was not debated again until late July, after appointment of a Committee of Detail to prepare a draft Constitution. *See* 2 Farrand 106. The Committee's draft gave the

provisions: George Mason, Edmund Randolph and James Madison (Virginia); Gouverneur Morris (New York); Caleb Strong (Massachusetts); John Rutledge and Charles Cotesworth Pinckney (South Carolina); and William Paterson (New Jersey). Two others, James Wilson and Jared Ingersoll, had been defense counsel in a 1780 impeachment trial under the Pennsylvania Constitution of 1776. P. Hoffer & N. Hull, *Impeachment in America, 1615-1805* at 81 (1984). By 1787, ten states had constitutional impeachment provisions, and five state impeachment trials had been conducted, all principally before the upper house of the legislature. *Id.* at 68-95; *see generally State Constitutions*, *supra*, vols. I-VII.

[2] William Paterson of New Jersey presented an alternative constitutional plan on June 15 which provided that Executive officials would be "removable by Congress on application by a majority of the Executives of the several states," while placing trial of impeachments "in the first instance" "in the judicial courts." 1 Farrand 242, 244. In addition, Alexander Hamilton of New York offered an alternative impeachment mechanism on June 18. *Id.* at 282. Neither proposal was debated by the Convention.

House of Representatives "the sole Power of Impeachment," and placed impeachment trials in the Supreme Court. *Id.* at 178-79, 186.

On August 9, the Convention agreed, without debate, to grant the House the sole power of impeachment. *Id.* at 231. The impeachment trial proved more difficult to resolve. Elbridge Gerry of Massachusetts moved on August 20 that the Committee of Detail establish "a mode of trying the Supreme judges in cases of impeachment," since, if the Supreme Court were to conduct impeachment trials, trying Supreme Court judges could become awkward. *Id.* at 344. Rutledge, on behalf of the Committee of Detail, proposed that the Senate conduct the trials of Supreme Court judges. *Id.* at 367.

c. The Delegates Reject Removing Judges By "Address"

On August 27, John Dickinson was on his feet again, this time proposing to increase legislative power over the judiciary. Dickinson moved that federal judges be removed "by the Executive on the application by the Senate and the House of Representatives." *Id.* at 428. The proposal was copied from the British practice (followed in a few states) of removing judges by "address," without any charges or trial, on a majority legislative vote. *See* Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 *Sup. Ct. Rev.* 135, 137. Roger Sherman of Connecticut endorsed the idea, citing "the British statutes." 2 Farrand 428.

James Wilson objected, arguing that "Judges would be in a bad situation if made to depend on every gust of faction which might prevail in the two branches of our Government." *Id.* at 429. Randolph, too, contended that Dickinson's proposal would "weaken[] too much the independence of the Judges." *Id.* Dickinson's motion was defeated by a 7-1 vote. *Id.*

d. The Final Version

The final impeachment trial clause emerged in a report issued by another drafting committee on September 4. The idea of a Senate trial plainly had taken root, as reflected in the provision that the Vice President "shall be ex officio President of the Senate, except when *they sit to try* the impeachment of the President." *Id.* at 498 (emphasis added).

The debate over the September 4 report centered on the dangers of giving too much power to the Senate. *Id.* at 500, 511, 522-24 (G. Morris; C. Pinckney; J. Rutledge; J. Wilson). But on September 8 the delegates rejected, 9-2, a motion by Madison to remove presidential impeachment trials from the Senate. *Id.* at 551. Gouverneur Morris then moved to add the requirement that senators "shall be on oath" for impeachment trials. *Id.* at 552. The final provision, approved by a 9-2 vote, stated (*id.*):

> The Senate of the United States shall have power to try all impeachments: but no person shall be convicted without the concurrence of two thirds of the members present: and every member shall be on oath.

Also on September 8, the delegates appointed a five-member committee "to revise the stile of and arrange the articles which had been agreed to by the House." 2 Farrand 553. In its draft of September 12, the Committee of Style inserted the word "sole" for the first time, giving the Senate "the sole power to try all impeachments." *Id.* at 592.

e. Post-Convention Statements

In the Federalist, Hamilton explained the Framers' ultimate determination to commit impeachment trials to the Senate and not to the Supreme Court. *The Federalist* No. 65, at 426 (B. Wright ed. 1961). He questioned whether Supreme Court judges "would at all times be endowed with so eminent a portion of fortitude as would be called for in the execution of so difficult a task," and whether "they would possess the degree of credit

and authority" necessary to reject impeachment charges brought by the "immediate representatives" of the people, the House of Representatives. *Id.* at 427. The solution, Hamilton wrote, was a "tribunal more numerous than would consist with a reasonable attention to economy." *Id.* at 428. This "numerous court" also was needed because of the immense power of impeachment: "The awful discretion which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons." *Id.*

The need for a "numerous court" derived from the Framers' belief that the preservation of liberty requires an independent judiciary. Hamilton noted that judges would be "tried by the Senate," which he called "the only provision on the point which is consistent with the necessary independence of the judicial character." *The Federalist* No. 79, at 498. Thus, Hamilton observed that life tenure for judges is an "excellent barrier to encroachments and oppressions of the representative body." Of the three branches, the judiciary "will always be the least dangerous to the political rights of the Constitution," and "all possible care is requisite to enable it to defend itself against [the other branches'] attacks." *The Federalist* No. 78, at 490-91. During the Convention, Madison also had argued that judges should not depend on Congress for reappointment "[b]ecause they might be tempted to cultivate the Legislature, by undue complaisance, and thus render the Legislature the virtual expositor, as well as the maker of the laws." 2 Farrand 34.

During the Pennsylvania Convention to ratify the Constitution, James Wilson defended the constitutional mandate that the Senate "must try all impeachments." II *Documentary History of the Ratification of the Constitution* 491 (M. Jensen ed. 1976); *id.* at 480 (Senate's duties include "trying impeachments"); *id.* at 568 (same). In a later lecture, Wilson noted that under both

the federal and Pennsylvania constitutions, "All impeachments shall be tried by the Senate." II *Works of James Wilson*, at 44-45 (J. Andrews ed. 1896). Wilson did not flinch at the prospect of a "numerous" court, tracing constitutional impeachment procedures to Athenian impeachments "prosecuted before the popular assembly, or before the senate of 500." *Id.* at 46.

2. Senate Impeachment Trials Until 1986

From 1798 through 1936, six out of ten impeachment trials resulted in acquittal (Justice Samuel Chase in 1805; Judge James Peck in 1831; President Andrew Johnson in 1868; former Secretary of War William Belknap in 1876; Judge Charles Swayne in 1905; and Judge Harold Louderback in 1933). Two essentially uncontested trials ended with convictions (Judge John Pickering in 1803; Judge West Humphreys in 1862), as did two other trials (Judge Robert Archbald in 1913 and Judge Halsted Ritter in 1936). The Senate abandoned two impeachment proceedings because the accused had left office (Sen. William Blount in 1798 and Judge George English in 1926).

a. The First 100 Years Of Trials

In the first century after the Philadelphia Convention, the Senate diligently conducted impeachment trials before the entire body, without any suggestion that a committee hear the evidence.[3] Through the first four impeachment proceedings, the Senate routinely referred to itself as a "High Court of Impeachment." 8 Annals of Cong. 2245 (1797) (Blount); 13

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[3] Contemporaneous state impeachments also did not use trial committees. *See generally* P. Hoffer & N. Hull, *supra*, at 78-95, 116-45, 164-77. For example, the Nicholson impeachment trial in 1793 was conducted for six weeks before the full Pennsylvania Senate. *Id.* at 138-39. During the 1788 Greenleaf impeachment, the Massachusetts State Senate heard evidence for nine days, *id.* at 125-26, while in the Osborne impeachment in Georgia in 1797, the State Senate heard "weeks" of testimony. *Id.* at 132-33. The South Carolina Senate observed full trial procedures during the 1793 Moultrie impeachment. *Id.* at 136.

Annals of Cong. 323 (1804) (Pickering); 14 Annals of Cong. 88 (1804) (Chase); A. Stansbury, *Report of the Trial of James H. Peck* 48-49 (DaCapo Press 1972) (Hilliard, Gray & Co. 1833). Indeed, the House of Representatives attended much of the Peck and Humphreys trials. *See id.* at 85, 93, 125, 126, 142, 161, 180, 188, 203, 221, 239, 267, 306, 327, 334, 371, 372, 425, 453, 523; A. Hinds, *Hinds' Precedents of the House of Representatives of the United States* § 2392 (1907) [hereinafter *"Hinds' Precedents"*].

In the first federal impeachment, that of Sen. William Blount in 1798, Sen. Henry Tazewell of Virginia moved that a lay jury be empaneled to hear the evidence. Tazewell reasoned that the Bill of Rights' guarantee of a jury trial superseded the Senate impeachment trial clause. Aurora General Advertiser, Feb. 20, 1798, p. 2, col. 2; *id.*, Feb. 28, p. 2, col. 2.

The Senate, however, hooted down the proposal. Sen. Elijah Paine of Vermont denounced "the monstrous absurdity of having thirty-two judges and twelve Jurors," and pointed to five state constitutions that simultaneously provided for both jury trial of criminal cases and Senate trial of impeachments. Aurora General Advertiser, Mar. 1, 1798, p. 2, col. 2; *id.* (Sen. Read) (same); *id.*, Feb. 28, 1798, p. 2, col. 2-3 (Sen. Ross) (same); *id.*, Feb. 20, 1798, p. 2, col. 4 (Sen. Mason) (same). The Tazewell proposal was defeated 26-3, keeping the trial before the Senate itself.

For the Chase trial in 1805, Vice President Burr designed the Senate's "seating arrangements to conform to those of a court." Burton, *An Independent Judiciary: The Keystone of Our Freedom*, 39 A.B.A.J. 1067, 1070 (Dec. 1953). Burr placed the senators on either side of his chair as presiding officer, facing the respondent and the House Managers. *Id.* Burr's seating arrangements were revived for the Humphreys trial in 1862.

Hinds' Precedents, at § 2392.[4] The attentiveness of the senators was praised at the early trials.[5]

The first complaints about Senate attendance arose at the Belknap trial in 1876, a unique proceeding almost calculated to discourage attendance. *Proceedings of the Senate Sitting for the Trial of William W. Belknap*, 4 Cong. Rec. (Pt. 7) 293-94, 44th Cong. 1st Sess. (1876) [hereinafter *"Belknap Proceedings"*]. On the first trial day, Belknap's counsel moved to dismiss the case because Belknap had resigned. The Senate narrowly voted to proceed, 37-29. *Id.* at 76. Since more than one-third of the Senate opposed trying Belknap at all, his acquittal was a foregone conclusion. Thomas, *The Law of Impeachment in the United States*, 2 Am. Pol. Sci. Rev. 378, 389 (1908); Brown, *The Impeachment of the Federal Judiciary*, 26 Harv. L. Rev. 684, 700 n.19 (1913); *see also Belknap Proceedings*, at 171-73, 293-94.

b. The Early Twentieth Century Senate Trials

In the four impeachment trials before the Senate in this century, attendance occasionally was criticized. *See, e.g., Proceedings in the Senate of the United States in the Matter of the Impeachment of Charles Swayne*, S. Doc. No. 194, 58th Cong. 3rd Sess. 14, 631 (1905) [hereinafter *"Swayne Proceed-*

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[4] The trial of Judge Humphreys, who had accepted a commission as a Confederate judge and did not appear for his trial, was conducted at a time of great national urgency. During the trial in May and June of 1862, Confederate armies won victories at Winchester, Virginia, due west of the Capitol, and at Seven Pines, Virginia, one hundred miles south. During this period, the Senate also debated the prohibition of slavery in the territories. Cong. Globe, 37th Cong., 2nd Sess. 2618 (1862). Still, the Senate heard Humphreys' trial to conclusion.

[5] *Proceedings on the Impeachment of William Blount* 75 (Philadelphia, J. Gales ed. 1799) [hereinafter *"Blount Proceedings"*] (defense counsel Ingersoll); 14 Annals of Cong. 310 (1805) (Chase trial) (remarks by Chase, J.); *id.* at 584 (House Manager Rodney); Stansbury, *supra*, at 475 (Peck trial) (defense counsel Wirt).

ings"]. The Senate developed several procedures for dealing with the question. Quorum calls were employed to bring Senators into the chamber, since no official Senate business may be conducted in the recognized absence of a quorum.[6] The Senate heard testimony at night and on Saturdays to accelerate the trials.[7] Senators who missed the trial proceedings often were excused from voting on the articles.[8] Still, many senators acknowledged their obligation to hear the evidence as jurors,[9] echoing views expressed in earlier impeachment trials.[10] In-

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[6] *E.g.*, *Belknap Proceedings*, at 219, 314; *Swayne Proceedings*, at 568, 571, 631, 662; *Proceedings of the U.S. Senate and the House of Representatives in the Impeachment of Robert W. Archbald*, S. Doc. No. 1140, 62nd Cong., 3rd Sess. 97, 128-29, 159-60, 176, 201, 232, 292, 387, 718, 1219-20 (1913) [hereinafter *"Archbald Proceedings"*]; *Proceedings of the United States Senate in the Trial of Impeachment of Harold Louderback*, S. Doc. No. 73, 72nd Cong., 2nd Sess., 73rd Cong., 1st Sess. 141, 213, 245, 248, 331, 375, 388, 529-30, 713-14, 778, 814 (1933) [hereinafter *"Louderback Proceedings"*]; *Proceedings of the United States Senate in the Trial of the Impeachment of Halsted L. Ritter*, S. Doc. No. 200, 74th Cong., 2nd Sess. 3-4, 27-30, 47-48, 77-78, 95, 137-38, 203, 225, 324, 344-45, 393-94, 415, 467-68, 492-93, 534, 555, 598-99, 621-22, 628 (1936) [hereinafter *"Ritter Proceedings"*].

[7] *Belknap Proceedings*, at 74, 75, 202; *Swayne Proceedings*, at 569; *Archbald Proceedings*, at 292, 757; *Ritter Proceedings*, at 467-68, 492-93.

[8] One senator was excused from voting on Judge Swayne, *Swayne Proceedings*, at 716; eight senators were excused from voting in Judge Archbald's case because they had not heard the testimony, *Archbald Proceedings*, at 1394, 1515, 1620-21; fifteen senators were excused from voting on all or some of the Louderback charges for the same reason, *Louderback Proceedings*, at 771-72, 823-36; and Sen. Tydings was excused from voting at the Ritter trial, *Ritter Proceedings*, at 15.

[9] *Louderback Proceedings*, at 823 (Sen. Glass); *id.* at *837* (Sen. Bailey); *Ritter Proceedings*, at *657* (Sen. Benson); *Swayne Proceedings*, at 485 (Sen. Bate).

[10] 14 Annals of Cong. 597 (1805) (Chase trial) (House Manager Rodney); Cong. Globe, 40th Cong., 2nd Sess. 424 (1868) (Johnson trial) (Sen. Edmunds).

deed, when Vice President Garner commented on certain evidence against Judge Ritter, he noted that the Senate "is sitting as a jury," albeit "a jury which will not be influenced by statements of that kind." *Ritter Proceedings*, at 547-48.

The Senate's diligence is highlighted in the Louderback trial in 1933, which extended for 76 of the first "100 Days" of Franklin Roosevelt's first administration, one of the busiest legislative periods in history. Even in that trial, however, the Senate again emphasized the need for Senators to receive testimony directly. In fact, when Judge Louderback sought permission to take the deposition of W.S. Leake, a Californian in very poor health, the House Managers insisted on live testimony from Leake, arguing that "it is of prime importance in this matter that if this man Leake's testimony be taken, it be taken before the trial body," so that "his demeanor and testimony be examined." *Louderback Proceedings*, at 144. The Senate agreed that Leake had to testify in person, before the entire Senate, and unanimously ordered his arrest so the Senate "may properly execute the functions imposed upon it." *Id.* at 270. Leake was arrested and brought to the Senate to testify. *Id.* at 631-32.

3. Adopting Senate Impeachment Rule XI: 1934-35

After the Louderback trial, the Judiciary Committee proposed a new Impeachment Rule XI to allow a committee of twelve senators to hear and report on the evidence in an impeachment case.[11] Under Rule XI, the Senate votes on the impeachment articles after receiving the committee's report of the evidence and hearing closing arguments.

The debate on Rule XI revealed considerable doubt about its constitutionality. Echoing the demand for live testimony during the Louderback trial, Sen. Hiram Johnson insisted that "a trial of the questions of fact . . . depends quite as much upon

[11] The committee hearing option was first mentioned in 1904, *see* 38 Cong. Rec. 3660 (1904) (Sen. Hoar), but was not pursued until the Louderback trial was completed.

the witnesses who are called, their appearance on the stand, [and] their mode of giving testimony." 78 Cong. Rec. 9432 (1934). Johnson asked whether in "a matter of such grave concern and importance, is it well for us to indulge in a trial, as it were, vicarious in character, which really will be conducted by a committee?" Senator Borah of Idaho went further, stating that "the Senate is the body which tries the respondent, not a subcommittee or a committee of the Senate; and therefore the respondent would be entitled to a full trial in every respect before the entire Senate if he should ask for it." 78 Cong. Rec. 9928 (1934); *see also id.* at 9929 (remarks of Sen. Fletcher).[12]

When the Ritter impeachment was to be tried in 1936, the Senate again debated Rule XI. Sen. Austin of Vermont, a member of the Judiciary Committee, recognized that "there is so much doubt about the constitutionality of the resolution," 80 Cong. Rec. 3425 (1936), and cautioned that "the Senate cannot by resolution do away with the right of the individual who becomes a respondent in an impeachment proceeding. The Senate might constitutionally waive its rights, but when it undertakes to waive or do away with the rights of a respondent under the law...we cannot do it." *Id.* Sen. Ashurst, the Judiciary Committee Chairman and chief proponent of Rule XI, admitted that "[a] considerable division of opinion exists as to whether the Senate possesses the power to have the testimony in impeachment trials taken by committee." *Id.* at 3424.

Ashurst observed that Rule XI was intended to "simplify the work" of the Senate after Louderback's "dreary, involved, and protracted" trial, but he agreed that Rule XI could be used only "if and when the respondent was willing thus to have the testimony taken by a committee and the managers also were thus willing." *Id.* at 3426. Ashurst pledged, "I would not vote that a special committee should be appointed to take the testimony

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[12] Two senators disagreed. *See* 78 Cong. Rec. 9928 (1934) (Sen. Robinson); *id.* at 9929 (Sen. Norris).

unless the respondent and the managers requested that such be done." *Id.* at 3425-26. No senator disagreed.

4. Rule XI: The 88 Senators Who Do Not Hear The Evidence Disproportionately Favor The Prosecution

Judge Ritter's case in 1936 was not referred to a Rule XI committee. But when the next impeachment trial arose fifty years later, Harry Claiborne was denied a trial before the full Senate, as were Alcee Hastings and petitioner in 1989.[13]

In the Claiborne, Hastings, and Nixon cases, there were significant differences between the votes of the senators who sat on the Rule XI committees and the votes of the other senators. In each, the eighty-eight senators not on the Rule XI committee disproportionately favored the prosecution. *See* Pet. Br. App. B (table of votes); Pet. Br. App. C (bar graph). On seventeen out of eighteen articles, the senators who actually heard and saw

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[13] Individual senators continue to question the constitutionality of Rule XI. Sen. Heflin, a committee member in both the Claiborne and Nixon trials, has stated that the Framers "intended that the Senate conduct a full judicial trial on the Senate floor," Heflin, *The Impeachment Process: Modernizing an Archaic System*, 71 Judicature 123 (Aug.-Sept. 1987), and has compared the 88 Senators who do not hear the evidence to "sleeping jurors." Heflin, *Impeaching Federal Judges: Making the Case for Change*, Trial 32, 34 (Nov. 1990). *See also* 132 Cong. Rec. 32628 (1986) (Sen. Levin) (Senate should not "make findings in those disputed areas where witness demeanor or credibility is critical. . . . The Senate, as a finder of fact, did not hear or see a single witness. And, as a result, our ability to fairly reach decisions, when the facts were in dispute, was restricted."); 132 Cong. Rec. 32625 (1986) (Sen. Evans) ("Although all 100 of us sat in judgment, only a chosen few heard testimony or examined witnesses."); 132 Cong. Rec. 29873 (1986)(Sen. Bingaman) ("essential to hear witnesses and judge the credibility of those witnesses. . . . [P]utting the record of evidence presented to the committee into the possession of all Senators is not an adequate substitute.")

the evidence voted to acquit in significantly greater proportions than did the other senators.[14]

This variation between committee members and other senators is not a mere statistical curiosity, but often reflects the difference between winning and losing. Of the ten impeachment articles on which Hastings and Nixon were convicted, nine failed to carry a two-thirds majority of the committee members. *See* Pet. App. B, at 62a. If the Senate's vote had reflected the same distribution as the votes of the senators who heard the evidence, Hastings would have been acquitted on all charges, and Nixon would have been acquitted on two of three articles.

5. Impeachment Proceedings Against Nixon

On May 10, 1989, the House of Representatives adopted three articles of impeachment against Nixon. H. R. Res. 87, 101st Cong., 1st Sess., 135 Cong. Rec. H1802-03, 1811 (daily ed. May 10, 1989), *reprinted in Impeachment of Judge Walter L. Nixon, Jr.*, S. Doc. No. 8, 101st Cong., 1st Sess., 19-25 (1989).[15] The first two articles were based on perjury charges on which Nixon was convicted in 1986. Impeachment Article III, an "omnibus" article, charged that Nixon made "one or more" of 14 alleged false or misleading statements in an FBI interview and grand jury testimony. The articles were exhibited in the Senate on May 16, 1989.

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[14] On the eighteenth Article (Article XVI against Judge Hastings), the committee members and non-committee members both voted unanimously to acquit. The votes described here, and in Pet. Br. App. B and Pet. Br. App. C, are reported in the Congressional Record. *See* Jt. App. C, at 12a-33a (Nixon vote); 135 Cong. Rec. S13782-88 (daily ed. Oct. 20, 1989) (Hastings vote); 132 Cong. Rec. 29870-73 (1986) (Claiborne vote).

[15] The record of proceedings in the Senate consists of thirteen volumes. The volumes, which were marked as Appendix 4 to Plaintiff's Motion for Summary Judgment filed with the District Court on Feb. 20, 1990, also include all proceedings in the House and in the courts. Three additional sets of the 13-volume impeachment record were lodged with the Court of Appeals below.

The Senate adopted Resolution 128 pursuant to Impeachment Rule XI, appointing a committee of twelve senators "to receive and to report evidence." *See* S. Res. 128, 101st Cong., 1st Sess., 135 Cong. Rec. S5133-34 (daily ed. May 11, 1989), *reprinted in Report of the Impeachment Trial Committee on the Articles Against Judge Walter L. Nixon, Jr.*, S. Rep. No. 164, 101st Cong., 1st Sess. 97-98 (1989) [hereinafter "Imp. Rec., Comm. Report"]. On July 25, 1989, after oral argument, the Rule XI Committee denied Nixon's motion for trial before the full Senate. *Hearings Before the Senate Impeachment Trial Committee on the Articles of Impeachment Against Judge Walter L. Nixon, Jr.*, S. Hrg. No. 247, 101st Cong., 1st Sess., Pt. 1 at 319-21 (1989) [hereinafter "Imp. Rec., Pt. __"].

The Rule XI Committee heard ten witnesses on September 7, 8, 12 and 13, with a quorum of seven members required for each session. *Id.*, Pt. 2. The committee also received the record of the criminal trial, post-conviction proceeding, and House impeachment hearings. *Id.*, Pts. 3, 4A (Vols. I and II), 4B (Vols. I, II and III), and 4C. Although the hearing was televised to Senate offices and videotaped, "[t]he record is silent as to how many Senators took advantage of these opportunities to view the committee proceedings." Pet. App. B, at 60a.

6. The Charges Against Nixon Turned Entirely On Credibility

As with any perjury case, Nixon's turned on who was believed, the accused or the accuser. In March 1983, Nixon visited Wiley Fairchild, a businessman with whom he had made an investment some years before. Fairchild said that Paul "Bud" Holmes, a local prosecutor and friend of Nixon's, was "blackmailing" him concerning a drug prosecution of Fairchild's son Drew. Fairchild did not ask Nixon to do anything about the situation.[16]

[16] Imp. Rec., Pt. 2 at 54-55, 60, 63, 86, 232-233, 249-50, 297; Pt. 4A, Vol. I at 481-84, 640-41, 643; Pt. 4A, Vol. II at 1536; Pt. 4B, Vol. I at 208-09, 434.

When Nixon saw Holmes later that day at Holmes' farm, he mentioned Fairchild's blackmail accusation. Holmes said Fairchild was "crazy" and offered to explain the drug case. Nixon responded that he did not want to discuss it.[17] Out of Nixon's hearing, Holmes telephoned Fairchild to say that he would honor a previous plea bargain with Drew Fairchild. Holmes then called Nixon to the telephone, and Nixon heard Fairchild thank him for raising the blackmail matter and say he was satisfied.[18]

The FBI began an investigation in early 1984 after receiving anonymous calls falsely accusing Nixon of accepting a gratuity to influence the Drew Fairchild case.[19] The accusations were leaked to the press, triggering intense media coverage.

Nixon volunteered to be the first witness before the investigating grand jury.[20] He testified fully, with supporting documentation, about his transaction with Wiley Fairchild. On the Drew Fairchild case, he said that he knew from the news media that it was the subject of unexplained delays; that state prosecutor Holmes was a friend; and that he had done nothing to influence the case.[21]

When asked whether Holmes had discussed the Drew Fairchild case with him, Nixon said no. As Nixon explained to

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[17] *Id.*, Pt. 2 at 145-46, 151, 235, 251, 253; Pt. 4A, Vol. II at 1539-1540; Pt. 4B, Vol. I at 305, 435, 437.

[18] *Id.*, Pt. 2 at 99, 101, 114, 236; Pt. 4A, Vol. I at 636, 739; Pt. 4A, Vol. II at 1542; Pt. 4B, Vol. I at 179-180, 246.

[19] *Id.*, Pt. 2 at 17, 28, 30; Pt. 3 at 501, 572-73, 1136, 1263, 1517; Pt. 4A, Vol. I at 275-76, 299.

[20] *Id.*, Pt. 2 at 18, 36-41, 44-45, 134, 240; Pt. 3 at 28-29, 32, 42-46, 1537-39; Pt. 4A, Vol. I at 811-12; Pt. 4A, Vol. II at 1710; Pt. 4B, Vol. I at 443, 449-50.

[21] *Id.*, Pt. 2, at 241, 288, 297; Pt. 3 at 53-98, 142, 432; Pt. 4B, Vol. I at 452-53.

the Rule XI Committee, he was preoccupied at the time by the false charge that his investment was tied to the drug prosecution. The questions on that subject did not prompt his recall of the brief conversations on the related, but distinct, subject of Holmes' "blackmail" of Wiley Fairchild.[22]

Nixon was indicted for accepting a gratuity from Wiley Fairchild, and on three counts of lying to the grand jury. He was acquitted on the gratuity charge and one perjury charge. Imp. Rec., Pt. 3 at 317-18.

The remaining perjury counts depended on Holmes' testimony about the conversations at his farm. Holmes himself had been indicted on five perjury counts for *his* grand jury testimony, but pled guilty to a single contempt charge in return for testifying against Nixon. Holmes claimed that Nixon had asked him to "put in a good word" for Fairchild's son, and that, after Nixon's grand jury appearance, Nixon asked him not to divulge their conversation about Drew's case.[23] Nixon denied ever seeking to influence the Drew Fairchild prosecution or to silence Holmes, and disputed Holmes' version of the conversations.[24] Nonetheless, Nixon was convicted on two counts of perjury.

In the Rule XI hearing, Holmes again contradicted Nixon. Holmes also admitted that he lied three times in the grand jury, lied again in a sworn deposition, and lied yet again in a sworn affidavit prepared for the impeachment. When asked which of

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[22] *Id.*, Pt. 2 at 241, 252, 280-81, 287-88, 316-17; Pt. 3 at 48-106; Pt. 4B, Vol. I at 467-69. Although the prosecutors were aware of the conversations at issue when they questioned Nixon, for undisclosed reasons they never asked him directly about them. *Id.*, Pt. 2, 175; Pt. 3, 53-144, 836-838.

[23] *Id.*, Pt. 2 at 138, 242-43; Pt. 3 at 290-91, 432; Pt. 4A, Vol. I at 813-17; Pt. 4B, Vol. I at 291; Pt. 4B, Vol. II at 997-1005; Imp. Rec., Comm. Report at 70-71.

[24] Imp. Rec., Pt. 4A, Vol. II, at 1539-40, 1546-47, 1558, 1570, 1575, 1589-91, 1599-1600.

his contradictory sworn statements was true, Holmes replied, "You can use any one you want."[25]

Wiley Fairchild, who also disputed certain of Nixon's recollections, has testified that he lied to the federal prosecutors, lied to the grand jury, and lied at Nixon's criminal trial. Yet he told the Rule XI Committee that he has *always* told the truth in this case.[26] One court has described Fairchild's testimony as "self-contradictory, puzzling and incredible." *Nixon v. United States*, 703 F. Supp. 538, 553 (S.D. Miss. 1988), *aff'd*, 881 F.2d 1305 (5th Cir. 1989).

In its report, the Rule XI Committee cautioned that knowledge of the contradictory testimony was "critical" (Imp. Rec., Comm. Report at 18-19): "Many specific details — including some that are very important — about each of these conversations are disputed by the parties. Indeed, the committee received dramatically inconsistent testimony concerning the substance, date, and result of these conversations . . . ."

Echoing these remarks, one Committee member, who voted to acquit on two articles, stated that "the cast of characters in this case also poses serious problems of credibility." *Proceedings of the United States Senate in the Impeachment Trial of Walter L. Nixon, Jr.*, S. Doc. No. 22, 101st Cong., 1st Sess. 459-60 (1989) (Sen. Murkowski) [hereinafter "Imp. Rec., Proceedings"]. For that senator, Wiley Fairchild "has failing memory and has given various versions of the facts since 1984," while Bud Holmes "has given so many versions of certain facts that he suggested the Senate panel could cho[o]se whichever ones we felt comfortable with." In contrast, the senator noted, "I had the chance to observe Judge Nixon as he testified. He seemed to be a decent, civil man, perhaps more so than those who testified against him." *Id.* Eighty-eight colleagues, how-

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[25] Imp. Rec., Comm. Report at 33; Imp. Rec., Pt. 2 at 144; *id.*, Pt. 4B, Vol. 1 at 310-15.

[26] Imp. Rec., Pt. 2, at 75; Pt. 4A, Vol. I, at 522.

ever, could not take the same careful measure of the witnesses and their evidence.

Perhaps inadvertently, the Committee Report heightened the senators' need to hear the evidence by erroneously suggesting that Nixon's testimony "contrast[ed]" with his own trial testimony. Imp. Rec., Comm. Report at 74. In fact, his testimony did not change, but the committee report omitted material passages of his trial testimony. *See* Imp. Rec., Proceedings, at 173-92 (comparison of testimony).

7. Post-Hearing Activity And Vote

On November 1, the full Senate heard closing arguments by the House Managers, counsel for Nixon, and briefly, Nixon himself. However, "the Senate, as such, did not see witnesses and hear their testimony." Pet. App. B, at 59a. After the arguments, the President Pro Tempore addressed to counsel written questions from senators. The entire session took less than four hours. Imp. Rec., Proceedings at 357-422; 135 Cong. Rec. S14493-517 (daily ed. Nov. 1, 1989).

The Senate deliberated in executive session the following day, coming back on November 3 to vote. The Senate first voted 90-7 to deny Nixon's motion for trial before the full Senate. *See* Jt. App. C, at 16a-18a. The Senate then voted to convict on the first two articles by margins of 89-8 and 78-19, respectively. *Id.* at 22a-27a. Based largely on objections to the form of Article III, which confusingly duplicated the first two articles, the Senate acquitted on that article. *Id.* at 27a-32a. *See also* Imp. Rec., Proceedings at 429-34; 135 Cong. Rec. S14634-35 (daily ed. Nov. 3, 1989); *id.* at 457-58 (Sen. Dole); *id.* at 449-50 (Sen. Kohl); *id.* at 458-59 (Sen. Biden); *id.* at 464 (Sen. Murkowski).

The convictions were certified and deposited with respondent Baker. Respondent Mecham, as Director of the Administrative Office of the United States Courts, terminated Nixon's salary and benefits as a District Judge.

8. Prior Court Proceedings

On June 1, 1989, Judge Alcee Hastings sued the Senate and several Senate employees, raising eleven challenges to the impeachment proceedings against him. Nixon intervened, challenging only the Rule XI procedure. The district court dismissed the action. *Hastings v. United States Senate*, 716 F. Supp. 38 (D.D.C. 1989) (Pet. App. C, at 70a-78a). The court of appeals affirmed on the sole ground that the action was premature, since neither plaintiff had yet been removed from office. *Hastings v. United States Senate*, No. 89-5188 (D.C. Cir. 1989) (Pet. App. D, at 79a-82a).

Following his Senate conviction, Nixon brought this declaratory action. The district court expressed considerable agreement with Nixon's constitutional claim, but held the action nonjusticiable. *See* Pet. App. B.

The court of appeals affirmed, with the panel writing three separate opinions. The court opinion by Judge Williams held that the case presented a nonjusticiable political question. Since the Framers selected the Senate over the Supreme Court to conduct impeachment trials, Judge Williams inferred that they must have intended for the courts to be powerless concerning impeachments. He distinguished *Powell v. McCormack*, 395 U.S. 486 (1969), noting that the House of Representatives had exceeded a textual limitation on its authority to judge members' qualifications. In a concurrence, Judge Randolph doubted that the political question doctrine applied, but held that since the courts were not identified in the Constitution as having any authority over impeachments, they may not review those proceedings.

Judge Edwards disagreed with his colleagues on justiciability. Pointing to *Powell*, he wrote, "[i]t is the court's task to interpret and give content to the word 'try' [in the Impeachment Clause], just as it was the Court's job in *Powell* to give meaning to the word 'Qualifications'" in Article I, section 5.

Pet. App. A, at 34a. Judge Edwards concluded, however, that receiving evidence through a committee hearing "can be accommodated" within the impeachment clause. *Id.* at 48a.

Nixon filed a timely petition for rehearing, which was denied on August 5, 1991. Pet. App. E, at 83a. The Petition for Writ of Certiorari was filed on November 4, 1991, and granted on February 24, 1992.

SUMMARY OF ARGUMENT

Under this Court's decisions, this case is fully justiciable if the Senate has violated a textual limitation on its impeachment powers. *Powell v. McCormack*, 395 U.S. 486 (1969). Accordingly, we first examine whether Impeachment Rule XI violates the impeachment trial clause, and then address justiciability.

The constitutional history of the impeachment clause and the unbroken practice of the Senate for 150 years demonstrate that the Framers intended that the Senate itself, and not a committee of a few senators, actually see and hear the evidence in an impeachment trial. A committee hearing, followed by a Senate vote, is not trial by the Senate.

In establishing a new form of constitutional government, the Framers worried most about how to control government power. By separating governmental powers among three coordinate branches, the Framers limited the powers exercised by any one official or group of officials.

The question persisted, however, of how to remove corrupt or abusive individuals from positions of trust. Although periodic elections would allow the people to remove miscreant legislators, executive and judicial officials were not so easily recalled. Removing judges, in particular, posed a thorny problem. The Framers prized judicial independence and sought to protect it with life tenure. But not even judges could be left completely uncontrolled in the Framers' "carefully crafted sys-

tem of checked and balanced power." *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647, 659 (1989).

The impeachment process was designed to provide the needed limit on executive and judicial officers, but to be only an extraordinary remedy. The Framers mistrusted legislative bodies, too, believing "the powers conferred on Congress were the powers to be most carefully circumscribed." *INS v. Chadha*, 462 U.S. 919, 947 (1983). Accordingly, they hedged the impeachment power with numerous restrictions designed to ensure that it could not become a tool of legislative tyranny.

One of the principal restrictions on the Senate's impeachment power is at issue here: the requirement that the Senate may remove only those officers who have been proved, at a Senate trial, to have committed impeachable offenses. The language of the Constitution unmistakably directs the Senate itself to conduct a judicial-type trial in impeachment cases. The Senate is to "try" an impeachment "case" before senators who are "present" and "sitting" on "oath," over whom the Chief Justice may "preside," and whose decision is to "convict" or acquit. U.S. Const., Art. I, § 3, cl. 6 & 7; Art. II, § 4; Art. III, § 2, cl. 3, & § 3, cl. 1. All of these terms reflect the Framers' central intention that the power to remove judicial and executive officials be exercised with great deliberation, only after a trial by the Senate and a two-thirds vote to convict.

By providing that eighty-eight senators never hear the evidence in an impeachment case, Rule XI fundamentally disrupts this careful constitutional structure, upsetting the balance of powers that the Framers prescribed and that the Senate respected in its conduct of impeachment trials through its first 150 years. That balance is particularly critical when the judiciary, the "least dangerous branch," is threatened by the Senate's violation of the textual restrictions on its power to remove judges.

Acting under Rule XI, the Senate could not make the credibility determinations that lay at the heart of the perjury case against Nixon, and that will lie at the center of the "white-collar" prosecutions that are likely to arise against judicial or executive officers. Unfamiliar with the facts of the case or the witnesses, and unable to determine the weight to be accorded to conflicting testimony, the Senate's vote under Rule XI no longer resembles the careful exercise of judgment — a finding of facts based on evidence — demanded both by the Framers and by the gravity of the constitutional confrontation. Rather, it closely resembles the removal of judges by "address," based on political criteria and expediency. But removal by address was specifically rejected by the Philadelphia Convention. Such a plain violation of the Constitution cannot be justified by any desire to lighten the burdens of office for senators.

Because this case concerns whether the Senate has violated a textual limitation on its impeachment trial powers, it is the "province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). The political significance of the underlying issue does not transform this case into a nonjusticiable political question. *United States Dep't of Commerce v. Montana*, 60 U.S.L.W. 4279, 4283-84 (U.S. March 31, 1992). Indeed, judicial review is especially critical in cases like this, which concern the separation of powers. Without judicial review, individuals would have nowhere to turn when the executive or legislative branches exceed the textual limits on their powers. Just as the courts may review the Senate's exercise of its power to legislate, or its power to judge its members' qualifications, they may review this case.

Under Rule XI, impeachment becomes easy, conviction is politically expedient, judicial independence is sapped, and the constitutional balance of powers is tilted forever. This case was brought, in the first instance, to vindicate the rights of a former

district judge from south Mississippi. But at issue is whether the nation will preserve its historic separation of powers by enforcing the constitutional limits on the Senate's power to remove executive and judicial officers.

ARGUMENT

I. TRIAL BY COMMITTEE IS UNCONSTITUTIONAL

A. Constitutional Text

The terms of the Constitution establish that the Framers meant for the Senate, and not a small fraction of that body, to conduct impeachment trials. Every constitutional provision that refers to impeachment trials reinforces the plain meaning of Article I, section 3, clause 6, that the full Senate must conduct a judicial trial of an impeachment case:

> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present.

The Constitution thus commands "the Senate" to "try all Impeachments." This Court must give full weight to the Framers' selection of the verb "try" to describe the Senate's obligation. "Try" means more than simply "vote on" or "review" or "judge." In 1787 and today, trying a case means hearing the evidence, not scanning a cold record. Thus Hamilton described the Senate, in trying impeachments, as acting in a "judicial character as a court" and conducting an "inquest." *The Federalist* No. 65, at 426-27 (B. Wright ed. 1961).

The other components of the impeachment clause similarly reflect the basic understanding that the Senate itself must con-

duct the trial. The clause describes the Senate as "sitting" for and "present" at impeachment trials. But under Rule XI, the Senate neither "sits" nor is "present" at the receipt of evidence.

The impeachment clause directs the Chief Justice, rather than the Vice-President, to "preside" over Senate trials in presidential impeachments. Surely the Chief Justice was not expected to "preside" over a committee of twelve senators. Because the text does not establish a lesser trial requirement for judicial impeachments, those proceedings also must be conducted before the entire Senate.[27]

That "try" did not mean merely to "judge" or "vote on," but instead contemplated the Senate's actually seeing and hearing evidence, is confirmed by the separate requirement of a two-thirds majority vote to "convict[]." If "try" meant only to judge or vote, as in the English practice of removing judges by address, the Framers would not have distinguished between the Senate's duty to "try" the case and the vote needed to convict. C. Black, *Impeachment: A Handbook* 10 (1974) ("The Senate is to 'try' all impeachments, not simply vote on them."). The impeachment clause thus contrasts with the Senate's power to be "the Judge of the Elections, Returns, and Qualifications of its own Members." U.S. Const., Art. I, § 5, cl. 1. Although that provision requires only that the Senate render an "independent final judgment," *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972), the impeachment clause demands more: that the Senate "try" the case and "convict[ ]" or acquit.

The impeachment clause also requires all senators, like jurors, to "be on Oath or Affirmation." This parallel between Senate impeachment trials and jury trials is explicit in Article

[27] This point is driven home by the wording of the resolution agreed to by the Convention: "the vice-president shall preside over the Senate except when *they sit to try the impeachment of the President*, in which case the Chief Justice shall preside." *See supra* p. 6 (emphasis added). Although the Committee of Style rearranged this language, those changes cannot be construed as substantive. *See infra* pp. 41-42.

III, section 2, clause 3: "The trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . . ." That provision contemplates that the trial body — be it the jury in criminal cases or the Senate in impeachment cases — actually hear the evidence of guilt or innocence. Equally, the provision refers to impeachment "Cases," a judicial term.

Article II, section 4 provides that the "President, Vice President and all civil officers" shall be removed from office "on impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." Again, the accused must be "convicted," an outcome of judicial trials based on evidence. Moreover, the specified impeachable offenses are discrete criminal acts or episodes of official misconduct ordinarily proved through trial, not by informal legislative inquiry.

Indeed, Article III, section 3 explicitly connects convictions to the hearing of evidence by directing that "No Person shall be *convicted* of Treason unless on the *Testimony of Two Witnesses*". (Emphasis added.) Just as a treason conviction requires the hearing of "testimony" by "witnesses," so must a conviction in an impeachment case be based on the evidence seen and testimony heard by the Senate. Moreover, because treason is an impeachable offense, the treason clause would permit the Senate to "convict" in treason cases only after hearing the testimony of at least two accusing witnesses, which is contrary to the procedure prescribed by Rule XI.

The jury trial provisions of the Bill of Rights reinforce this textual analysis. The Seventh Amendment provides: "In suits at common law . . . the right of *trial* by jury shall be preserved, and *no fact tried by a jury* shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." (Emphasis added.) The Framers surely intended that facts tried by the Senate, like "facts tried by a jury," would be found on the basis of testimony heard and evidence viewed.

The Sixth Amendment guarantees "a speedy and public *trial*, by an impartial jury," and decrees that the accused shall be "confronted with the *witnesses* against him and to have compulsory process for obtaining *witnesses*." (Emphasis added.) That trial guarantee is tied directly to the presentation of witnesses to "an impartial jury," just as the senator/jurors must hear the witnesses in an impeachment trial.[28]

Within the four corners of the Constitution, the overwhelming evidence shows that the Framers deliberately selected the verb "try" to direct the Senate to conduct a judicial-type trial in impeachment "cases," over which the Chief Justice may "preside," with senators "present" and "sitting" on "oath," deciding whether to "convict" or acquit. A Rule XI proceeding does not meet these clear specifications.

B. Senate Impeachment Trials Preserve The Separation Of Powers

Why did the Framers insist that the Senate, as a "numerous court," conduct an impeachment trial that was intended *not* to be consistent "with a reasonable attention to economy"? The Framers' choice of this unwieldy process was not based on obsessive proceduralism, or a perverse desire to obstruct the smooth functioning of government. Rather, the Senate trial was adopted because the Framers feared giving the ultimate power

[28] Late Eighteenth Century usage further supports the interpretation of "try" as involving direct presentation of witnesses and other evidence to the decisionmaker. *See* T. Sheriden, *A Dictionary Of The English Language* (1780) ("to try" means "to examine as a judge; to bring before a judicial tribunal"). Blackstone defined "trial" as "the examination of the matter of fact in issue," and observed that the "best method of trial, as the best evidence upon that trial," is required. III *Blackstone's Commentaries on the Laws of England* 330 (6th ed. 1775). This same usage persists today. *See, e.g., Black's Law Dictionary* 1516 (6th ed. 1990) ("To examine judicially. To examine and investigate a controversy, by the legal method called 'trial,' for the purpose of determining the issues it involves."); *see also* C. Black, *Impeachment: A Handbook* 10 (1974) ("the word 'try' is a word used almost invariably with regard to judicial trials").

of impeachment to any branch of government. Even the supposedly more deliberative Senate could not be trusted with complete power to remove executive and judicial officials. That immense power could be exercised only if the Senate, after a trial, convicted the official of specific offenses by a two-thirds majority. *See* 2 Farrand 428-29. Only this arduous process for removing judges would be "consistent with the necessary independence of the judicial character." *The Federalist* No. 79, at 498 (Hamilton).

The Constitution is a "carefully crafted system of checked and balanced power within each Branch." *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. at 659; *accord, e.g., Buckley v. Valeo*, 424 U.S. 1, 124 (1976). The principle of checks and balances grew from the Framers' view that "[t]he accumulation of all powers, legislative, executive, and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist* No. 47, at 336 (B. Wright ed. 1961) (Madison); *accord Mistretta*, 488 U.S. 361, 109 S. Ct. at 659-60.

The Framers strongly mistrusted legislatures. Because "[i]n republican government, the legislative authority necessarily predominates," *The Federalist* No. 51, at 356 (Madison), it was "the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed." *Chadha*, 462 U.S. at 947; *see also Mistretta*, 488 U.S. 361, 109 S. Ct. at 660. ("[T]he Framers recognized the particular danger of the Legislative Branch's accreting to itself judicial or executive power . . . ."); *Morrison v. Olson*, 487 U.S. 654, 698-99 (1988) (Scalia, J., dissenting) (Framers "weakened the legislature" to counteract its tendency to assume powers).

The Framers also believed that the judiciary, in particular, would be vulnerable to legislative overreaching. Hamilton

stressed that "all possible care is requisite to enable it [the judicial branch] to defend itself against their attacks." *The Federalist* No. 78, at 491 (Hamilton).

These critical concerns drove the Philadelphia Convention to reject John Dickinson's proposal that judges be removed by "address" through a majority legislative vote, with no trial at all. *See supra* p. 5. The delegates objected that Dickinson's proposal would subject the courts to "every gust of faction" and "weaken[] too much the independence of the Judges." Earlier, they had rejected a comparable Dickinson proposal for the expeditious removal of executive officers, protesting that it would make the executive "the mere creature of the Legislature." 1 Farrand 85-86.

The Senate trial emerged as a central element of the "carefully crafted system of checked and balanced power" by guarding against legislative tyranny. To ensure the responsible exercise of the awesome power to remove officers from other branches of government, the Senate must act in a "judicial character as a court." *The Federalist* No. 65, at 426 (Hamilton). Impeachment is a "NATIONAL INQUEST into the conduct of public men," the result of which must be a "real demonstration[] of innocence or guilt." *Id.* at 427. Careful trial procedures will check "persecution . . . [b]y an intemperate or designing majority in the House of Representatives." *Id.* at 430. The Senate must try impeachments by "cool and candid investigation." 3 Farrand 144, 148 (J. McHenry, addressing Maryland House of Delegates, Nov. 29, 1787).

In the absence of any evidence that the Framers contemplated the use of committees of senators to try impeachments, or intended to grant the Senate unlimited flexibility to do so, Rule XI fundamentally disrupts the checks and balances inherent in the impeachment clause. By drastically reducing the number of senatorial "jurors" to a fraction of what was intended and thus disposing of impeachments more quickly, with less

understanding, Rule XI significantly tilts to the legislature the balance of powers.[29]

C. Early Senate Practice

As this Court stated in *Powell*, the "precedential value of [Congressional practices] tends to increase in proportion to their proximity to the Convention in 1787." 395 U.S. at 547. *Powell* noted approvingly that "what evidence we have of Congress' early understanding confirms our conclusion." *Id.* at 547.

Senate practice for a century and a half following ratification confirms that impeachment trials must be conducted before the entire Senate. In the first three cases, seven former delegates to the Philadelphia Convention participated as senator/jurors,

[29] This analysis cannot be contravened by the House of Lords' supposed "long history of using committees to hear witnesses . . . in impeachment trials," which, it is supposed further, "was well known to the Framers." *See* Opposition to Petition for Writ of Certiorari, at 16 & n.18; Pet. App. A, at 48a-50a, 53a-54a (Edwards, J.). Only a handful of proceedings in the House of Lords in the early 1620s show any evidence that committees were used, and those committees were chiefly used to investigate allegations and draw up charges, not to try the accused. *See, e.g.*, E. Foster, *The House of Lords* 153-61 (1983); C. Tite, *Impeachment and Parliamentary Judicature in Early Stuart England* 172 (1974). In Sir Francis Bacon's case in 1621, after witnesses were examined "in the House itself," E. Foster, *supra*, at 155, the accused confessed, which "obviated the need for the Lords to use the committee's evidence." Williams, *The Historical and Constitutional Bases for the Senate's Power to Use Masters or Committees to Receive Evidence in Impeachment Trials*, 50 N.Y.U. L. Rev. 512, 529 (1975). In the trial of Lionel Cranfield, cited by respondents below, a five-day trial took place before the Lords, with the accused "often calling witnesses in his own defense." Tite, *supra*, at 165.

In other impeachments during this period, and in all impeachments after 1626, the Lords made no use of committees. *See* E. Foster, *supra*, at 156-57, 167-72 (1983) (Bennet in 1621 and Strafford in 1640); Tite, *supra*, at 226-27 (Field in 1621 and Bristol in 1626); J. Hatsell, *Precedents of Proceedings in the House of Commons* (1818) (no mention of committees in six impeachment trials between 1700 and 1780). Nor is there any evidence that the Framers were aware of the ancient and infrequent use of committees by the Lords.

counsel for the respondent, or the accused.[30] Each trial was deliberately modelled on criminal trials, permitting all senators to see and hear the witnesses. *See supra* pp. 8-10. Not only the entire Senate sat for each of the early impeachment trials, but the House of Representatives sometimes attended. *See supra* p. 9. In later trials, senators who missed testimony often asked to be excused from voting on the impeachment articles because they could not serve as proper jurors. *See supra* p.11 & n. 8.[31] No one suggested for more than 100 years that review of a written record could be an adequate substitute for a Senate trial.

Before this century, the sole American mention of a committee in impeachment trials is a passing reference in Jefferson's Manual of Parliamentary Practice: "a committee may be named, who shall examine them in committee." Jefferson's Manual of Parliamentary Practice, *reprinted* in H.R. Doc. No. 256, 101st Cong., 2nd Sess. 109, 306 (1985). Jefferson's manual, however, only offered "a sketch of some of the principles and practices of England," and did not purport to comment on the meaning of trial by "the Senate" in the Constitution. *Id.* at 298. Nor can his Manual be read as evidence of original intent: Jefferson did not

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[30] At the Blount proceeding, Jared Ingersoll was defense counsel and John Langdon of New Hampshire served in the Senate. Sen. Blount himself had been a Convention delegate from North Carolina. The Pickering impeachment was tried before Senators Abraham Baldwin of Georgia, Jonathan Dayton of New Jersey, and Pierce Butler of South Carolina. Three Framers (defense counsel Luther Martin and Senators Dayton and Baldwin) participated in the Chase trial.

[31] *Louderback Proceedings*, at 771 (Sen. Copeland) ("I have heard none of the testimony and feel myself incompetent either to vote or to continue as a member of the court"); *id.* at 823 (Sen. Glass) ("other public duties have made it impossible for me to be present and hear more than fragments of the testimony . . . . I feel that, under my oath, I am not so advised as to be able to render a verdict as a juror").

attend the Constitutional Convention, and his Manual was written a decade later.[32]

D. A Fair Impeachment Trial Is Impossible When Seven-Eighths Of The Senators Do Not Hear The Evidence

As demonstrated by the voting patterns in the Claiborne, Hastings, and Nixon impeachments, a Rule XI proceeding is inherently unfair to the accused. The committee members, the only true "jurors" in those proceedings, proved far more receptive to the arguments of the accused than were their uninformed colleagues. *See supra* pp. 14-15; Pet. Br. App. B; Pet. Br. App. C. This bias of the uninformed destroys the Framers' careful separation of powers, rendering the judiciary more vulnerable to a legislative power that the Framers meant to check. The reasons for this biased outcome are plain, and demonstrate the Framers' wisdom in choosing a judicial "trial" by the entire Senate.

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[32] Moreover, Jefferson's views on impeachment matters are not presumptively authoritative. In 1798, Jefferson endorsed Sen. Tazewell's dubious theory, rejected by the Senate, that lay juries should hear impeachment trials. *Jeffersonian Cyclopedia* § 3860-61 (J. Foley ed. 1900) (quoting Letter to Sen. Henry Tazewell (1798)); *see supra* p. 9. Unlike the Framers, Jefferson was no great supporter of judicial independence, as he "questioned the degree to which the Constitution insulates the judiciary," *Chadha*, 462 U.S. at 961 n.3 (Powell, J., concurring), and "predicted that the people 'will see then and amend the error in our Constitution, which makes any branch independent of the nation.'" *Id.* (quoting letter from Jefferson to William Giles during Jefferson's second term as President).

Jefferson is often considered the moving force behind the Chase and Pickering impeachments, which were designed to begin a wholesale purge of Federalist judges from the federal courts and thereby reverse *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). *See* II G. Haskins & H. Johnson, *History of the Supreme Court of the United States, Foundations of Power: John Marshall, 1801-1815* at 205-11 (1981); Burton, *supra*, 39 A.B.A.J. at 1068-69. Jefferson lamented Chase's acquittal, calling impeachment "a farce which will not be tried again." *Jeffersonian Cyclopedia*, *supra*, § 3854.

Credibility issues, which lay at the heart of the perjury case against Nixon, cannot responsibly be decided by a jury that neither sees nor hears the witnesses. Several senators have protested the Senate's failure in Rule XI proceedings, "as a finder of fact," to hear and see witnesses. *See supra* pp. 13-14 & n. 13. Sen. Heflin noted the inadequacy of the Rule XI procedure after the Claiborne trial (Heflin, *The Impeachment Process, supra*, at 124):

> The other 88 members of the Senate did not have the advantage of hearing the testimony and arguments by counsel. The transcript of the hearing on Judge Claiborne's impeachment totaled over 3,500 pages. Therefore, it is highly improbable that any Senator had the time to thoroughly review this material. Few Senators other than the 12 members of the Impeachment Committee were familiar with all the elements of the case.[33]

Nor is a committee summary of the evidence an adequate substitute for hearing the witnesses. Any summary is necessarily the product of editorial judgments. In this case, the committee report acknowledged its limitations, stating that the committee heard "dramatically inconsistent testimony" and concluding that "[f]amiliarity with these witnesses' various, and divergent, testimony" was "critical." Imp. Rec., Comm. Report at 18-19.

More important, no report can provide the demeanor evidence essential to evaluating conflicting testimony. As James Wilson remarked, jurors "hear everything that is alleged; they not only hear the words, but they see and mark the features of the countenance; they can judge the weight due to such testimony." II M. Jensen, *supra*, at 573; *accord, e.g., Universal*

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[33] Following the Nixon impeachment, Sen. Heflin stated that the competing demands on senators who are not on the trial committee "preclude them from thoughtfully considering the evidence presented at an impeachment trial." Heflin, *Impeaching Federal Judges, supra*, at 34.

Camera Corp. v. National Labor Relations Bd., 340 U.S. 474, 495-96 (1951); *United States v. Nelson*, 476 F.2d 254, 256 (9th Cir. 1973); *NLRB v. Dinion Coil Co.*, 201 F.2d 484 (2d Cir. 1952) (Frank, J.). One must see and hear the witnesses in order to evaluate credibility.

In this case, only the twelve members of the Rule XI Committee saw and heard Nixon's accusers. Only the committee members watched Wiley Fairchild stumble through a series of failed and conflicting recollections of events long past. When Bud Holmes was asked which of several conflicting versions of his testimony was the truth, only a few senators saw him shrug, "You can use any one you want." Imp. Rec., Pt. 2 at 144. Surely, when the Framers envisioned the Senate "sitting" "on oath" to "try" impeachments, they did not imagine that such pivotal moments would be reported to the Senate in a cold transcript, or "summarized" in a committee report. As the District Court found, the Rule XI procedure "plainly diminished the Senate's ability to appraise conflicting testimony." Pet. App. B, at 67a.

Unfortunately, the Committee Report compounded its inherent limitations by erroneously omitting key passages of Nixon's criminal trial testimony and inaccurately claiming that Nixon's testimony before the Committee "contrast[ed]" with his trial testimony. Imp. Rec., Comm. Report at 74. These errors would not have occurred had Nixon's impeachment trial been conducted before the Senate.

The parallel drawn by the Framers (and the early Senate) between the Senate's role in impeachments and that of a trial court was not accidental. The Framers understood that each senator, having taken an oath, would try the case by listening to the testimony and observing the witnesses' demeanor. Yet under Rule XI, the Senate functions not as a trial court, but as an appellate tribunal, receiving a written record of evidence supplemented with oral argument. Unlike an appellate court,

however, the Senate's constitutional duty is to try the case, not to review a trial record.

A final source of bias under Rule XI is the political character of impeachments, which the Framers fully recognized. There is no political advantage in siding with high officials accused by "the people" of "high crimes and misdemeanors." But Rule XI encourages a verdict based on political considerations, not facts. The accused has a fair chance of persuading those members of the Rule XI committee who hear the evidence. But the other eighty-eight senators, who vote in relative ignorance, are necessarily more susceptible to political exigencies. Not surprisingly, the accused has been convicted in all three Rule XI proceedings (even Alcee Hastings, who had been acquitted in court on identical charges). By contrast, the earlier trials conducted before the full Senate resulted in only four convictions, two of which were essentially uncontested.

Rule XI's bias against the accused is greatest in cases, like Nixon's, involving a prior jury conviction. Rule XI virtually ensures that senators who do not see or hear the witnesses will defer to the jury verdict. As Sen. Levin stated after the Nixon proceeding (Imp. Rec., Proceedings at 444-45):

> Would we be here but for Judge Nixon's conviction? I doubt it, since there is a reasonably supportable, benign explanation of his testimony before the grand jury. . . . I believe it is particularly appropriate for us to use that doctrine [collateral estoppel] in the matter of Judge Nixon, because of the Senate's refusal to allow him to conduct any impeachment trial before the full Senate. Because most of us were not members of the Senate committee that heard the evidence in this matter and were not present to evaluate the demeanor of the witnesses, we are at a disadvantage in making the factual findings required by this proceeding.

See also id. at 448 (Sen. Grassley) ("Judge Nixon is asking the Senate to overturn the verdict of the jury.").

The Framers would have been appalled by the proposition that Nixon's jury conviction was entitled to conclusive deference because eighty-eight senators did not know the facts of the case. That proposition utterly defeats the Framers' intent that there be a deliberate impeachment trial. Rule XI effectively guarantees that the eighty-eight uninformed senators will view the impeachment process as a plea "to overturn the verdict of the jury," not as a real trial in which the prosecution bears the burden of proof.

That the Senate must be able to evaluate evidence fairly and fully, without relying on any prior proceeding, was stressed by Jared Ingersoll, a delegate to the Constitutional Convention, when he addressed the Senate on behalf of Sen. Blount in 1798. Ingersoll successfully argued that the Senate was not a proper body to hear further charges against Blount, since it already had expelled him: "Do the Senate come, as Lord Mansfield says a Jury ought, like blank paper . . . . Would not error in the first sentence naturally be productive of error in the second instance?" *Blount Proceedings*, at 74.

Similarly, Hamilton, in *The Federalist* No. 65, emphasized the need for a trial body other than the courts when the alleged impeachable offense might also be prosecuted in the courts (*The Federalist* No. 65, at 428): "Would there not be the greatest reason to apprehend, that error, in the first sentence, would be the parent of error in the second sentence? That the strong bias of one decision would be apt to overrule the influence of any new lights which might be brought to vary the complexion of another decision?" Only a Senate trial provided "the double security intended . . . by a double trial." Rule XI eliminates that double security.

E. Trial By Committee Cannot Be Justified By Appeals To Expediency

The principal rationale for Rule XI is that the Senate has no time for impeachment trials. The press of legislative business, the argument goes, makes trial on the Senate floor a luxury of bygone days, particularly in light of the increased size of the Senate and the supposedly increasing "pace of impeachments." Pet. App. A, at 51a n.18.

This contention rests on distorted facts. First, there have been only thirteen federal impeachment trials in history; in this century, there have been seven, or an average of one every thirteen years. The Claiborne trial took seven trial days, Hastings eighteen, and Nixon four, for an average length of ten days. A task of this constitutional importance that requires ten days every thirteen years — less than one day a year — cannot be considered an unreasonable burden, particularly in light of prior Senate's attention to lengthy impeachment trials at the height of the Civil War, and through most of Franklin Roosevelt's "100 Days." *See supra* p. 12 & n. 4.

Moreover, the Senate is not significantly larger now than it was when it conducted impeachment trials itself. Over ninety Senators sat for the Archbald, Louderback and Ritter trials; ninety for Swayne; seventy-six for Belknap; and fifty-four for President Johnson.

But even if there were a greater burden on the Senate today than at the beginning of our constitutional history, that increased burden, by itself, could not justify ignoring a clear constitutional requirement. As the Supreme Court held in *Chadha*, 462 U.S. at 944:

> [T]hat a given law or procedure is efficient, convenient and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are

not the primary objectives — or the hallmarks — of democratic government. . . .

A second rationale offered for Rule XI is "fairness" to the accused. Since most senators will ignore a trial on the Senate floor, the argument goes, the quality of the deliberations would be even worse if the trial were conducted before all 100 senators. *See* Pet. App. A, at 54a-57a; *Hastings*, 716 F. Supp. at 40. This argument is entirely without force. The Framers surely understood that the quorum clause in Article I, section 5, clause 1, would govern attendance at official Senate proceedings, and considered that standard satisfactory. In any event, the "fairness" rationale's assumption of senatorial negligence is entirely unwarranted in light of the Senate's history of diligent attention to impeachment trials.

Moreover, this rationale would permit one branch of the government to eliminate constitutional responsibilities simply by defaulting on them. Could the judiciary eliminate the burdens of providing jury trials in private civil cases by declaring that jurors are ignorant louts who do not pay attention and too often follow their prejudices? *See Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 458 (1977). This Court can hardly decide this constitutional question by assuming congressional irresponsibility.

Perhaps the most disturbing feature of the expediency and "fairness" arguments is their utter lack of limits. Once Rule XI is permitted to sever the trial of impeachments from the constitutional text, there is no stopping point. In the District Court, the Senate admitted its ultimate goal of dispensing with impeachment hearings completely: "There is no support in the text, history, or purpose of the impeachment trial power to preclude the Senate from determining to try an impeachment based upon a written evidentiary record created through full and fair adversary proceedings." Memorandum of the United States Senate As Amicus Curiae in support of Judgment for Defendants

(March 20, 1990) at 54. If left up to the Senate, impeachment "trials" might someday consist merely of receiving the record of a criminal case, or of a disciplinary proceeding, or of House impeachment hearings.

That view of the impeachment clause is antithetical to the Framers' conclusion that a Senate trial is essential to the balance of powers, and announces a message fundamentally at odds with the constitutional scheme: impeachment becomes a routine matter, relegated to a committee so that the "real" business of the Senate is not disrupted. That view degrades the separation of powers, and denigrates the independence of the judiciary. This Court cannot uphold the transformation of impeachment, through Rule XI, from a grave confrontation of the branches of government into a bureaucratized bit of legislative business to be completed with the least possible effort.

II. THIS CASE IS JUSTICIABLE

Under our system of checks and balances, "[i]t is emphatically the province and duty of the judicial department to say what the law is" according to the provisions of the Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The impeachment clause is no exception: if Impeachment Rule XI contravenes Article I, section 3, clause 6, by substituting a committee hearing for a trial by the Senate, this Court must so declare, even though it means overturning "congressional consideration of [a] constitutional question." *United States v. Munoz-Flores*, 495 U.S. 385, 110 S. Ct. 1964, 1968-69 (1990).

The Court of Appeals declined to rule on Nixon's constitutional claim on the ground that it is nonjusticiable. Judge Williams' opinion for the Court characterized the issue of the Senate's compliance with the impeachment clause as a "political question." Judge Randolph's concurring opinion disclaimed reliance on the political question doctrine, but agreed that this

case is nonjusticiable under the doctrine of separation of powers. Both are wrong.

The judicial power to determine the constitutionality of Rule XI can no more be shared with or conferred exclusively on the Senate than "Congress [can] share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *United States v. Nixon*, 418 U.S. 683, 704 (1974).

A. The Constitution Does Not Grant The Senate Unreviewable Power To Conduct Impeachment Trials

1. The Word "Sole" In Article I, § 3, cl. 6 Does Not Preclude Judicial Review

The argument that this case is nonjusticiable turns largely on a single word: the Senate's "sole" power to try impeachments. Pet. App. A, at 4a, 16a. Respondents rely on the opinion in *Ritter v. United States*, 84 Ct. Cl. 293, 296 (1936), *cert. denied*, 300 U.S. 668 (1937):

> [W]hen the provision that the Senate should have "the *sole* power to try all impeachments" was inserted in the Constitution, the word "sole" was used with a definite meaning and with the intention that no other tribunal should have any jurisdiction of the cases tried under the provisions with reference to impeachment.

For Judge Williams, the term "sole" constitutes a "textually demonstrable commitment" to the Senate of the issue presented here, barring the courts from reviewing this case under the political question doctrine as formulated in *Baker v. Carr*, 369 U.S. 186, 217 (1962). Pet. App. A, at 4a, 13a. For Judge Randolph, the term "sole" prohibits review for separation of powers reasons, whether or not the case is strictly a "political

question." *Id.* at 16a. But the word "sole" cannot carry the immense significance so conferred on it.

First, the term was a cosmetic edit inserted by the Committee of Style at the tail end of the Convention, after the delegates had approved the substance of the impeachment trial clause. *See supra* p. 6. As this Court has stated in response to similar contentions (*Powell*, 395 U.S. at 538-39):

> [R]espondents' argument misrepresents the function of the Committee of Style. It was appointed only "to revise the stile of and arrange the articles which had been agreed to . . . ." 2 Farrand 553. "[T]he Committee . . . had no authority from the Convention to make alterations of substance in the Constitution as voted by the Convention, nor did it purport to do so . . . ." [quoting C. Warren, *The Making of the Constitution* 422 n.1 (1928)].

The meaning of Article I, section 3, clause 6 was thus entirely established before the Committee of Style inserted the word "sole."

With "sole" stripped of substantive significance, the text must be interpreted as the Framers intended: "The Senate of the United States shall have power to try all Impeachments." 2 Farrand 552, 572. The claim that this case is nonjusticiable then cannot be squared with *Powell v. McCormack* or other decisions of this Court.

Even if the Committee of Style's insertion of "sole" were given some weight, this case still would be fully justiciable. The ordinary understanding of "sole" in the impeachment trial clause is that the Senate — not the courts, not a lay jury, not a Senate Committee — shall try impeachments. After all, the Convention grappled for many weeks with the question of which entity should hear the impeachment trial. *See supra* pp. 3-6. Thus, the word "sole" flatly prohibits the Senate from doing what Rule XI

does: delegate the impeachment trial to an entity other than the Senate.

That "sole" has no impact on justiciability is powerfully supported by Article II, section 2, clause 1, which states that the president may grant pardons "except in cases of Impeachment." That limitation on the president's pardon power would not have been necessary if the Framers thought the impeachment trial clause already gave the Senate such total power that no other branch could address the issue. Indeed, the Framers specifically excluded impeached officers from the pardon power, but imposed no such impeachment exclusion on judicial review. The failure to exclude judicial review of constitutional challenges to impeachment procedures, in contrast with the express exclusion to impeachment pardons, further supports judicial review here.

2. Interpreting Constitutional Limits Is The Business Of The Courts

In *Powell*, the plaintiff claimed that the House of Representatives wrongly refused to seat him even though he met the qualifications for a congressman in Article I, section 2. The defendants contended that the claim presented a nonjusticiable political question. Relying on Article I, section 5, which gives the House the power to "Judge . . . [the] Qualifications of its own Members," the defendants argued that "the House, and the House alone, has power to determine who is qualified to be a member." 395 U.S. at 519. The provision granting the House the power to judge members' qualifications, the defendants contended, was a "textually demonstrable commitment" of the issue to the House, and barred the courts from review under *Baker v. Carr*.

This Court rejected that defense, observing that "Art. I, § 5, is at most a 'textually demonstrable commitment' to Congress to judge only the qualifications expressly set forth in the Constitution." 395 U.S. at 548. What qualifications applied to Powell, the Court ruled, is a question that courts can decide.

After reviewing the constitutional history of the "qualifications" clause and congressional practice under it, the Court held that Congress could apply only the standing membership requirements set forth in Article I, section 5.

Under *Powell*, even when the Constitution assigns a power to a coordinate political branch this Court still must judge whether that branch has complied with the textual limitations on its power. "The plenary authority of Congress . . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power." *Chadha*, 462 U.S. at 940-41; *see also Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 614 (1929) (Senate may judge members' elections, "subject only to the restraints imposed by or found in the implications of the Constitution"); *Missouri Pacific Ry. v. Kansas*, 248 U.S. 276 (1919) (two-thirds majority for veto override means two-thirds of quorum); *National Prohibition Cases*, 253 U.S. 350 (1920) (same); *United States v. Ballin*, 144 U.S. 1, 5-6 (1891) (House may determine presence of quorum by method "reasonably certain of ascertaining [that] fact" but may not evade quorum requirement).[34]

Although asserting that the Senate has "unreviewable" power to conduct impeachment trials, respondents concede that,

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[34] The justiciability of this case is reinforced by the conclusion of several state courts that, under state constitutional provisions modelled after the federal impeachment provisions, courts retain the power to ensure that impeachment powers are exercised in accordance with the state constitution. *See, e.g., Mecham v. Gordon*, 751 P.2d 957, 962 (Ariz. 1988) ("This Court does have power to ensure that the legislature follows the constitutional rules on impeachment."); *Kinsella v. Jaekle*, 475 A.2d 243, 253 (Conn. 1984) (courts may review impeachment issues "where legislature "is acting clearly outside the confines of its constitutional jurisdiction to impeach"); *In re Investigation by Dauphin Co. Grand Jury*, 2 A.2d 802, 803 (Pa. 1938) ("courts have no jurisdiction in impeachment proceedings . . . so long as actions taken are within constitutional lines").

under *Powell*, "judicial review might be available if the Senate were to exceed express textual limitations on its substantive impeachment powers: for example, if the Senate tried petitioner without prior House impeachment, Art. I, § 2, Cl. 5, or purported to impose a sanction more severe than removal or disqualification, Art. I, §3, Cl. 7." Opposition to Petition for Writ of Certiorari, at 9, 13. Respondents contend that Rule XI does not violate any "express textual limitations on its substantive impeachment powers." *Id.* at 13.

But Nixon's claim is that a Rule XI hearing does not satisfy the constitutional requirement that the Senate try all impeachments; respondents simply disagree with that claim on the merits. This dispute is no different in character from that presented in *United States Dep't of Commerce v. Montana*, 60 U.S.L.W. 4279 (U.S. March 31, 1992), a challenge to Congress' method of apportioning congressional seats among the states.

In addressing the government's political question argument in *Montana*, Justice Stevens stressed that "the Government does not suggest that all congressional decisions relating to apportionment are beyond judicial review." *Id.* at 4283. Because both parties there, as here, agreed "that the Constitution places substantial limitations on Congress's apportionment power and that violations of those limitations would present a justiciable controversy," *id.* at 4284, the issue in dispute was not "the existence of a judicially enforceable right," but "the definition of such a right." *Id.* When a case "turns on the proper interpretation of the relevant constitutional provisions," the Court stressed, the political question doctrine "presents no bar to our reaching the merits." *Id.*

As in *Powell*, *Montana*, *Chadha*, and *Missouri Pacific*, this case "turns on the proper interpretation of the relevant constitutional provision[]," Article I, section 3, clause 6. Such interpretation is the ordinary business of this Court.

Nor is judicial review precluded by the rulemaking clause of the Constitution, Article I, section 5, clause 2 ("Each House may determine the Rules of its Proceedings"). *See* Opposition to Petition for Writ of Certiorari at 9; Pet. App. A, at 9a-10a. Congress has the power to determine its own rules of procedure, but it "may not by its rules ignore constitutional restraints or violate fundamental rights." *United States v. Ballin*, 144 U.S. 1, 5 (1891).[35] This Court's review of whether the Senate has complied with the constitutional requirement for impeachment trials cannot be barred by the rulemaking clause, any more than that clause would bar review of the Senate's compliance with the two-thirds majority requirement or with the other limitations imposed on the impeachment power.

B. The Separation Of Powers Does Not Preclude Judicial Review, But Rather Requires It

That resolution of this case may impinge on the exercise of a core constitutional function by a coordinate branch does not render the matter nonjusticiable. "Our system of government requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch. The alleged conflict that such an adjudication may cause cannot justify the courts' avoiding their constitutional responsibility." *Powell*, 395 U.S. at 549. Although the courts will avoid "inappropriate interference in the business of the other branches of government," *Munoz-Flores*,

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[35] *Accord, e.g., Groppi v. Leslie*, 404 U.S. 496 (1972) (Due Process Clause applies to Congress's power to punish contempts); *Yellin v. United States*, 374 U.S. 109 (1963) (Court will review House committee procedures); *see also Morgan v. United States*, 801 F.2d 445, 450 (D.C. Cir. 1986) ("Authorization to determine rules of proceedings does not inevitably exclude review of the lawfulness of those rules."), *cert. denied*, 480 U.S. 911 (1987).

495 U.S. 385, 110 S. Ct. at 1964, the "[r]esolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications." *Chadha*, 462 U.S. at 943 (citations omitted).[36] Otherwise, "*every* judicial resolution of a constitutional challenge to a congressional [action] . . . would be impermissible." *Munoz-Flores*, 495 U.S. 385, 110 S. Ct. at 1968 (emphasis in original).

The paramount importance of maintaining the "carefully crafted system of checked and balanced power," *Mistretta*, 488 U.S. at 381, overrides any concern that judicial review diminishes either of the political branches. Thus, in deciding many difficult cases defining the constitutional limits of a coordinate branch's power, this Court has rejected arguments that the case was nonjusticiable. *See, e.g., Powell v. McCormack*, 395 U.S. 486 (1969); *United States v. Nixon*, 418 U.S. 683 (1974); *INS v. Chadha*, 462 U.S. 919 (1983); *United States v. Munoz-Flores*, 495 U.S. 385, 110 S. Ct. 1964 (1990); *United States Dep't of Commerce v. Montana*, 60 U.S.L.W. 4279 (U.S. March 31, 1992). In other, equally significant cases, the Court has properly assumed justiciability. *See, e.g., Missouri Pacific Ry. v. Kansas*, 248 U.S. 276 (1919); *National Prohibition Cases*, 253 U.S. 350 (1920); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Morrison v. Olson*, 487 U.S. 654 (1988); *Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647 (1989).

Here, although the Senate has the exclusive power to try impeachments, it may not exercise that power in violation of the Constitution. The Senate's power to try impeachments is no greater or more immune from judicial review than Congress'

[36] *Accord, e.g., Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986); *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982); *Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring in the judgment); *Baker v. Carr*, 369 U.S. at 217.

exclusive power to legislate, or its exclusive power to judge its members' qualifications at issue in *Powell*. All such powers are subject to judicial review to enforce constitutional limits.

Judge Williams contended that the intent of the Framers in placing the trial of impeachments in the Senate is inconsistent with judicial review of Nixon's claim, because "the judges themselves would sit in final judgment over this check on their excesses." Pet. App. A, at 6a. But to confer on the Senate the unreviewable power, not only to conduct impeachment trials, but to construe the constitutional provisions that govern that power, is to embrace "the particular danger of the Legislative Branch's accreting to itself judicial . . . power" feared by the Framers. *Mistretta*, 488 U.S. 361, 109 S. Ct. at 660. As Hamilton wrote in *The Federalist* No. 78, at 492:

> If it be said that the legislative body are themselves the constitutional judges of their own powers . . . it may be answered, that this cannot be the natural presumption . . . It is far more rational to suppose, that the courts were designed . . . to keep the [legislature] within the limits assigned to their authority.

"Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government." *United States v. Nixon*, 418 U.S. 683, 704 (1974) (citing *The Federalist* No. 47 (Madison)).

That the judiciary's interests may be affected by judicial review of legislative or executive action has never been deemed to preclude judicial review. *See, e.g., Mistretta v. United States*, 488 U.S. 361, 109 S. Ct. 647 (1989) (reviewing constitutionality of judicial commission to promulgate sentencing guidelines); *Morrison v. Olson*, 487 U.S. 654 (1988) (reviewing constitutionality of judicial appointment of special prosecutors).

Finally, executive officers, including the President, may be impeached, and Judge Williams' objection would not apply to judicial review in executive impeachment cases. Yet nothing in the impeachment clause or any other part of the Constitution suggests that judicial review should be available for violations of the impeachment clause only in executive impeachments. To the contrary, Article III, section 2, clause 1 provides that "[t]he judicial Power shall extend to *all* Cases, in Law and Equity, arising under this Constitution." (Emphasis added.)

Judge Randolph's suggestion that review of Nixon's claim would open the "floodgates" of impeachment litigation, and Judge Williams' desire to ensure "finality," are similarly without force. *See* Pet. App. A, at 13a, 16a-17a. A court decision applying the impeachment clause need not lead to endless litigation any more than *Powell* has submerged the courts in disputes over congressional qualifications. If a constitutional limitation is violated, judicial review must be available. *See Davis v. Bandemer*, 478 U.S. 109, 126-27 (1986).

When one branch violates a clear constitutional limit on its power, the courts may not avert their eyes and say, as did Judge Williams, that the nation's only recourse is at the ballot box. Pet. App. A, at 15a. Neither may courts throw up their hands when confronted with the possibility of extreme constitutional transgressions, mourning that in those circumstances "the republic will have sunk to such depths [that] no court could rescue it." *Id.* at 14a-15a. That response is an abandonment of the principle of judicial review, and with it the courts' responsibility under the Constitution.

By abdicating its responsibility to "try" impeachments, the Senate overreached its powers in the critical balance between the coordinate branches struck by the impeachment clause. Such a constitutional violation is fully reviewable by the courts. This conclusion protects the core constitutional values that hang in the balance here: by unilaterally changing the impeachment

procedure prescribed by the Constitution, the Senate has arrogated to itself greater power over the executive and the judiciary, to be exercised with less care.

CONCLUSION

For all of the foregoing reasons, the decision below should be reversed and declaratory judgment should be entered in favor of petitioner.

Respectfully submitted,

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APPENDIX A

UNITED STATES CONSTITUTION

Article I, Section 3, Clause 6

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Article I, Section 3, Clause 7

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Article II, Section 2, Clause 1

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

Article II, Section 4

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article III, Section 2, Clause 3

The trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Senate Impeachment Rule XI

[I]n the trial of any impeachment the Presiding Officer of the Senate, upon the order of the Senate, shall appoint a committee of twelve Senators to receive evidence and take testimony at such times and places as the committee may determine, and for such purpose the committee so appointed and the chairman thereof, to be elected by the committee, shall (unless otherwise ordered by the Senate) exercise all the powers and functions conferred upon the Senate and the Presiding Officer of the Senate, respectively, under the rules of procedure and practice in the Senate when sitting on impeachment trials.

Unless otherwise ordered by the Senate, the rules of procedure and practice in the Senate when sitting on impeachment trials shall govern the procedure and practice of the committee so appointed. The committee so appointed shall report to the Senate in writing a certified copy of the transcript of the proceedings and testimony had and given before such committee, and such report shall be received by the Senate and the evidence so received and the testimony so taken shall be considered to all intents and purposes, subject to the right of the Senate to determine competency, relevancy, and materiality, as having been received and taken before the Senate, but nothing herein shall prevent the Senate from sending for any witness and hearing his testimony in open Senate, or by order of the Senate having the entire trial in open Senate.

APPENDIX B

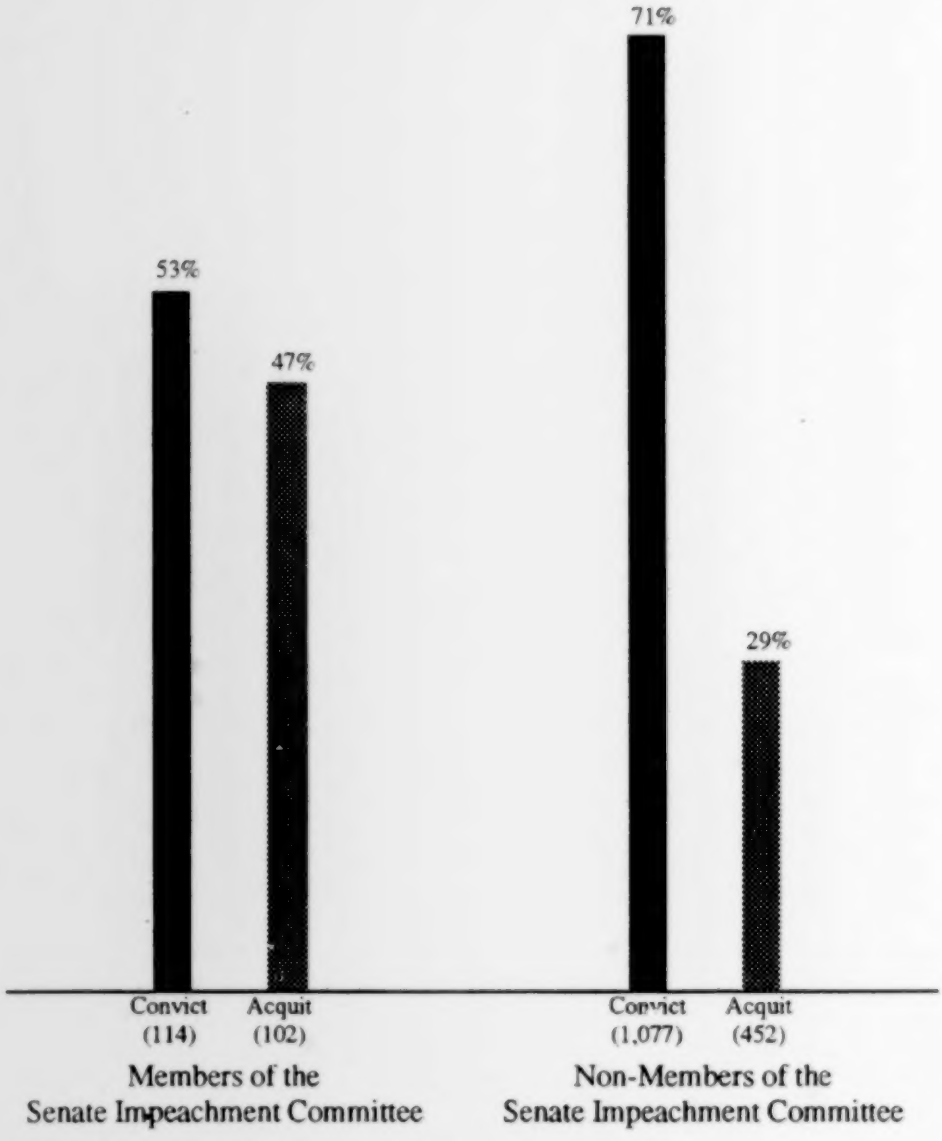
	COMMITTEE MEMBERS VOTE (%) Convict - Acquit	NON-COMMITTEE MEMBERS VOTE (%) Convict - Acquit	TOTAL VOTE Convict - Acquit
Claiborne			
Art. I	9-3 (75%)	78-7 (92%)	87-10
Art. II	9-3 (75%)	81-4 (95%)	90-7
Art. III*	3-9 (25%)	43-43 (50%)	46-52
Art. IV	9-3 (75%)	80-5 (94%)	89-8
Hastings			
Art. I	7-5 (58%)**	62-21 (75%)	69-26
Art. II	7-5 (58%)**	61-22 (73%)	68-27
Art. III	7-5 (58%)**	62-21 (75%)	69-26
Art. IV	6-6 (50%)**	61-22 (73%)	67-28
Art. V	7-5 (58%)**	60-23 (72%)	67-28
Art. VI*	3-9 (25%)	45-38 (54%)	48-47
Art. VII	7-5 (58%)**	62-21 (75%)	69-26
Art. VIII	6-6 (50%)**	62-21 (75%)	68-27
Art. IX	7-5 (58%)**	63-20 (76%)	70-25
Art. XVI*	0-12 (0%)	0-83 (0%)	0-95
Art. XVII*	6-6 (50%)	54-29 (65%)	60-35
Nixon			
Art. I	9-3 (75%)	80-5 (94%)	89-8
Art. II	7-5 (58%)**	71-14 (84%)	78-19
Art. III*	5-7 (42%)	52-33 (61%)	57-40

* Acquittal by Senate

** Less than two-thirds of trial committee members voted for conviction.

APPENDIX C

Votes for Conviction in the United States Senate on Articles of Impeachment Presented Against Judges Claiborne, Hastings, and Nixon*



*As reported in the Congressional Record. *See* Jt. App. C, at 12a-33a (Nixon vote); 135 Cong. Rec. S13782-88 (daily ed. Oct. 20, 1989) (Hastings vote); 132 Cong. Rec. 29870-73 (1986) (Claiborne vote).